

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

INDIAN HARBOR INSURANCE
COMPANY,

Plaintiff,

vs.

THE CITY OF SAN DIEGO,

Defendant

Case No. 12-cv-5787 (JGK-KNF)
ECF Case

Courtroom: 12B

Judge: Hon. John G. Koeltl

Counterclaim Filed: July 27, 2012

F.A.C. Filed: August 14, 2012

**CITY OF SAN DIEGO'S EVIDENTIARY OBJECTIONS TO THE DECLARATION
OF J. ROBERT MCMAHON IN SUPPORT OF OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rules of Civil Procedure, Rule 56 (c)(2), the City of San Diego (“City”), hereby objects to the declaration of J. Robert McMahon, submitted in support of Indian Harbor Insurance Company’s Motion for Summary Judgment, as follows:

Paragraph 5: Mr. McMahon’s statement that “the Policy was not issued or delivered in New York” calls for a legal conclusion. Indian Harbor relies on Mr. McMahon’s testimony to support its legal argument that the Policy was not “issued or delivered” in New York, therefore NY CLS Ins. §3240(a)(5) does not apply to the City’s claim for coverage. Mr. McMahon’s statement, however, requires application of law to fact, statutory interpretation, exceeds the permissible bounds of lay testimony, and must be stricken. *DVL, Inc. v. General Elec. Co.*, 811 F.Supp.2d 579, 591 (N.D.N.Y. 2010); *see also Brink v. Union Carbide Corp.*, 41 F.Supp.2d 402, 403 (S.D.N.Y. 1997) (striking portions of an affidavit that contained legal conclusions); *Roberts v. Ground Handling, Inc.*, 499 F.Supp.2d 340, 359 (S.D.N.Y. 2007) (“striking certain portions of defendant’s submissions in support of its motion for summary judgment . . . because they contain legal conclusions”); *Dengelman Indus. V. Pro-Tech Welding and Fabrication, Inc.*, No. 06-CV-6346, 2011 WL 6754053 (W.D.N.Y. May 31, 2011) (“[I]f a declaration improperly includes unsupported facts, legal arguments, or evidence that is not otherwise admissible, it may be stricken at the court’s discretion.”) citing *Hollander v. American Cynamoid Co.*, 172 F.3d 192, 198 (2d Cir. 1999)).

The fact is also not supported by the evidence. Mr. McMahon cites to the Policy, at pages 1 and 3 (Exhibit 1 to the Stern Declaration). Page 1 of the Policy reflects that XL’s Administrative Office is in Stamford, CT, and shows a Home Office in Bismarck, ND. Page 3 of the Policy reflects that the First Named Insured’s address is in Newport Beach, California. The evidence does not reflect that the Policy was issued from Exton, Pennsylvania, nor does it support that the Policy “was not issued or delivered in New York.” In fact, “Exon, Pennsylvania” is not mentioned anywhere in the Policy.

Based on the foregoing, the City respectfully requests that the Court strike Paragraph 5 of Mr. McMahon's declaration.

February 22, 2013

By: /s/ Caroline R. Hurtado

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CERTIFICATE OF SERVICE

I, Caroline R. Hurtado, HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via Pacer's Electronic Case Filing System (ECF), on this 22th day of February, 2013 upon all counsel of record:

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